

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## LEOPOLDO CARDENAS

Plaintiff,

V.

ELDON VAIL, *et al.*,

## Defendants.

CASE NO. C09-5602 RBL/JRC

## REPORT AND RECOMMENDATION

**NOTED FOR:**  
April 2, 2010

This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b) (1) (A) and 636(b) (1) (B) and Local Magistrate Judge's Rules MJR 1, MJR 3, and MJR 4.

Before the court is a motion for default against two of the defendants -- CANUSA and Robert Kennedy Publishing. Because neither of these defendants accepted service by mail, nor waived service, neither of the defendants is in default. The motion must be denied.

## FACTS

This action was commenced on September 28, 2009 when plaintiff filed a motion to proceed in forma pauperis and a proposed complaint (Dkt. # 1). In forma pauperis was granted on October 7, 2009 and an order directing service was entered on that date (Dkt. # 4 and 6). All

1 defendants who work for, or are entities of, the state have accepted service by mail (Dkt. # 7 thru  
2 24). The two defendants who did not accept service by mail or waive service are neither  
3 employees of the state nor state entities.

4 Plaintiff argues that when a party fails to answer default may be entered (Dkt # 27). The  
5 party against whom default is sought must first be properly served so that the court has personal  
6 jurisdiction. Here, neither of the defendants was served and plaintiff never brought a motion  
7 asking the court to serve them in person.

8

9 DISCUSSION

10 A defendant who has not appeared in an action and has not been personally served is not  
11 a party to the action and the court does not have personal jurisdiction over that defendant. Omni  
12 Capital Intern., Ltd. v. Rudolf Wolff & Co, Ltd., 484 U.S. 97 (1987).

13 The court lacks jurisdiction to enter default against CANUSA and Robert Kennedy  
14 Publishing in this case. The motion for default should be DENIED.

15 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
16 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
17 objections. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those  
18 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
19 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
20 **April 2, 2010**, as noted in the caption.

21  
22 Dated this 5<sup>th</sup> day of March, 2010.

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25   
26 J. Richard Creatura  
United States Magistrate Judge